

NO. SC92177

IN THE SUPREME COURT OF MISSOURI

CAROL FENDLER,
Appellant,

v.

HUDSON SERVICES and
DIVISION OF EMPLOYMENT SECURITY,
Respondents.

Review on Transfer After Opinion
from the Missouri Court of Appeals, Eastern District

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

I. The Facts Found by the Commission that Appellant Did Not Input Exact Clock In and Clock Out Times into the Employer's Computer Payroll System After Being Instructed to Do So Do Not Constitute Competent and Substantial Evidence that Appellant Willfully Committed Misconduct Connected with Work.

At issue in this case is whether the evidence that Ms. Fendler verified payroll by inputting the general number of hours worked by employees into the timekeeping reports, instead of inputting the exact in and out times as instructed by her supervisor, supports a determination of willful misconduct. The Division correctly states that in determining whether there is sufficient competent and substantial evidence to support a finding of misconduct, the evidence must be examined in the context of the whole record. Div. Br. 13 (citing *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003)). The Division, however, incorrectly categorizes the Commission's conclusion that Ms. Fendler's conduct amounted to insubordination as a finding of fact binding on this Court. *See* Div. Br. 14.

In its "Conclusions of Law," the Commission found that Ms. Fendler's failure to input exact in and out times when verifying payroll took her conduct "into the realm of insubordination." L.F. 28. Under Missouri law, insubordination is synonymous with misconduct. "Missouri case law defines 'insubordination' as a '*willful disregard of*

express or implied direction or a defiant attitude.’ ‘Rebellious,’ ‘mutinous,’ and ‘disobedient’ are often used as definitions or synonyms of insubordinate.” *Dixon v. Stoam Industries*, 216 S.W.3d 688, 693 (Mo. App. S.D. 2007) (emphasis added) (internal quotations omitted). Relying on *Dixon*, the Court of Appeals in *Guccione v. Ray’s Tree Service*, 302 S.W.3d 252, 258 (Mo. App. E.D. 2010), reversed the Commission’s finding of insubordination because “no evidence exist[ed] that [the claimant’s] intent was to act ‘rebellious’ or ‘disobedient.’” Since insubordination is synonymous with willful misconduct, it is a conclusion of law which this Court must review independently.

According to the Division, the Commission’s decision that Ms. Fendler committed misconduct is supported by the evidence that Ms. Fendler’s supervisor told her to list clock-in and clock-out times and that Ms. Fendler nevertheless verified payroll by inputting only the general number of hours worked. Div. Br. 24. However, these factual findings, even if taken as true, do not establish that Ms. Fendler had the requisite intent to willfully or deliberately violate the Employer’s payroll verification procedures. Each of the criteria for finding misconduct has an element of intent or culpability. *Sakaguchi v. Missouri Dep’t of Corrections*, 326 S.W.3d 890, 894 (Mo. App. W.D. 2010). Absent evidence of a willful intent to violate the payroll verification procedures, therefore, Ms. Fendler cannot properly be found to have committed misconduct.

Evidence that an employee violated an employer’s policy despite being aware of that policy is not, without more, competent and substantial evidence that the employee willfully committed misconduct connected with work. In *Tenge v. Washington Group*

Int'l, Inc., 333 S.W.3d 492, 497 (Mo. App. E.D. 2011), the employer communicated to the claimant its policy that required employees to report workplace injuries. *Id.* at 493. After the employee witnessed a co-worker “bang” his finger, he signed a written warning for failing to report the injury. *Id.* at 494. The employee testified that he did not report the incident because he did not see any sign of injury and the co-worker said he was “fine.” *Id.* Months later, the employee witnessed his co-worker get “shocked” while working with an electrical panel, but again he did not report it because he thought his co-worker was fine. *Id.* The claimant was discharged the following week for failing to follow the policy. *Id.* On appeal from the Commission’s unanimous decision denying unemployment benefits, the Court of Appeals reversed. According to the Court, the fact that the reporting policy was in writing and that the employee received a written warning for his first violation “[were] not, without more, determinative of willfulness.” *Id.* at 497.

Very recently, in *Welsh v. Mentor Management, Inc.*, 357 S.W.3d 277, 279 (Mo. App. E.D. 2012), the Court of Appeals addressed a situation where an employee signed a performance review in which he was told that he needed to communicate with his supervisor before sending out staff-wide emails. A week later, the employee sent an email to the entire staff and again was told it was inappropriate. *Id.* The Commission found the employee was counseled on the issue and that sending the email constituted misconduct. *Id.* at 280. The Court of Appeals reversed, holding that there was not sufficient competent evidence to support a finding of misconduct. *Id.* According to the Court, “the fact that [the employee] was counseled about e-mailing the entire staff

previously, without more, is not determinative of willfulness.” *Id.* at 281 (internal citation omitted).

As in *Welsh* and *Tenge*, the Court in *Duncan v. Accent Marketing, LLC*, 328 S.W.3d 488, 492-93 (Mo. App. E.D. 2010), held that the claimant’s failure to follow the employer’s policy despite being instructed to do so did not amount to willful misconduct without additional evidence that the claimant deliberately or purposefully erred. The Division attempts to identify factual differences between this case and *Duncan*, but draws a legally meaningless distinction when it states that “[t]he simplicity of the duty and instruction, and the duration of the misconduct, makes this situation different than *Duncan*.” Div. Br. 26. Nowhere in the *Duncan* opinion did the Court, either explicitly or by implication, reference the complexity of the employer’s policy in support of its conclusion that the claimant did not deliberately or purposefully err. Thus, it is clear that the Court of Appeals in *Duncan* confronted facts analogous to the instant dispute and concluded that, as a matter of law, there was not sufficient evidence that the claimant willfully committed misconduct connected with work.

In sum, the employers in *Tenge*, *Welsh*, and *Duncan* presented evidence that the claimants were warned about, or otherwise made aware of, company policies and that the claimants subsequently violated them on one or more occasions. Still, the Courts of Appeals in each case held that this evidence, without more, was not sufficient to establish the type of willful misconduct that would disqualify the claimants from receiving unemployment benefits.

Here, as in the above cases, the Employer presented evidence that Ms. Fendler was told to verify payroll by inputting in and out times and that on a handful of occasions Ms. Fendler verified payroll by inputting only the general number of hours worked. The Employer, however, did not present any other evidence that Ms. Fendler deliberately or purposefully erred. For example, the Employer did not show that Ms. Fendler explicitly told her supervisor, Ms. Meister, that she refused to input the in and out times. *See, e.g., Dixon v. Stoam Industries, Inc.*, 216 S.W.3d 688 (Mo. App. S.D. 2007) (evidence established willfulness where claimant explicitly told supervisor he would not comply with supervisor's orders). Nor was there any evidence that Ms. Fendler refused to meet with Ms. Meister to discuss the policy and her compliance therewith. *See, e.g., Noah v. Lindbergh Investment, LLC*, 320 S.W.3d 212 (Mo. App. E.D. 2010) (evidence established willful misconduct where claimant skipped work to take son on college visits despite denial of request for time off and then refused to attend meeting with supervisor regarding absence). Accordingly, the evidence presented by the Employer in this case, even if taken as true, is not, without more, competent and substantial evidence that Ms. Fendler willfully committed misconduct.

The Division further relies on *Hurlbut v. Labor and Industrial Relations Commission*, 761 S.W.2d 282 (Mo. App. S.D. 1988). In *Hurlbut*, the claimant was employed as a manager of a convenience store, which responded to a shortage of funds by instituting a policy that required all employees to verify beginning cash balances and then run calculator tape on the change box in order to track potential shortages. *Id.* The

claimant was aware of the procedure and that its purpose was to track potential cash shortages and even instructed other employees in the procedure. *Id.* Nevertheless, the claimant failed to verify the beginning cash balance at the beginning of one of her shifts and failed to run calculator tape in the cash box, resulting in an undocumented cash shortage. Even more, the claimant admitted that she did not run calculator tape for three or four days during the week that the shortage occurred. *Id.* at 284. The Court of Appeals found that the claimant chose not to enforce the employer's procedure and that the failure was more than mere negligence. This finding, according to the Court, was supported by the evidence, which showed that the employer emphasized the importance of the procedure by providing her a copy of the written policy, that the claimant was aware of the specific purpose of the policy, and that the claimant nevertheless admitted that she and her subordinates did not always prepare the calculator tape and place it in the change box.

Hurlbut contains several legally significant distinctions and is therefore not applicable to the instant case. The policy in *Hurlbut* was instituted in order to protect the employer against financial loss, the claimant was specifically made aware of the importance of the policy and purpose behind it by being provided with a written copy, and the claimant's subsequent failure to follow the policy resulted in actual financial loss. Indeed, the opinion placed much importance on the fact that the claimant's omissions involved the mishandling of company finances, stating that "[a]n employer has the right

to expect that its procedures will be followed, *especially in the accounting for funds.*” *Id.* at 285 (emphasis added) (internal quotations and citations omitted).

Subsequent cases have indicated that failure to follow procedures for the accounting of funds is a special category of conduct normally warranting the denial of unemployment benefits. The Court of Appeals in *Koret of California, Inc. v. Zimmerman*, 941 S.W.2d 886, 888-89 (Mo. App. S.D. 1997), for example, cited *Hurlbut* for the proposition that “mishandling of funds has been held to be misconduct warranting the denial of unemployment benefits” and concluded that the claimant committed misconduct by deliberately disregarding the employer’s accounting rules resulting in significant financial loss. Very recently, the Court in *Bridges v. Missouri Southern State University*, No. SD31323, 2012 WL 758959 at *5 (Mo. App. S.D. 2012), determined that “[a]n employee’s failure to follow procedure regarding the handling of funds, even if it occurs on only one occasion, is sufficient to support a finding of misconduct associated with work.” The Court found that the claimant committed misconduct because she was aware of her duties and “the serious obligation to properly care for the funds of others” and yet was responsible for more than 100 delayed reimbursements to the Department of Education. *Id.* at *6. It is clear that the significant responsibility involved in the accounting of funds contributed substantially to the Courts of Appeals’ finding competent and substantial evidence of misconduct in these cases.

In contrast to *Hurlbut*, *Zimmerman*, and *Bridges*, Ms. Fendler was not responsible for the accounting of funds. She was responsible for correcting the mistakes of other

employees who had failed to properly clock in and clock out at their jobs sites, and it is not in dispute that Ms. Fendler did so by inputting the general number of hours worked. Ms. Fendler did not mishandle the number of hours worked, much less the funds of the Employer. The Commission did not find, nor did the evidence show, that Ms. Fendler altogether failed to verify payroll or that the omissions of clock-in and clock-out times resulted in an incomplete payroll or unresolved payroll discrepancies or otherwise subjected the Employer to liability or fines. Thus, by all indications, Ms. Fendler's conduct, although a deviation from her supervisor's precise instructions, served the purpose behind the policy to resolve payroll discrepancies. This evidence, taken as a whole, does not support a finding of misconduct that would warrant the denial of Ms. Fendler's unemployment benefits.

The Missouri Courts of Appeals have held that the term "misconduct" should be strictly construed against the disallowance of benefits. *Whitted v. Div. of Employment Security*, 306 S.W.3d 704 (Mo. App. W.D. 2010). More recently, the Eastern District declared the following:

The statutory term "misconduct" should not be so literally construed as to effect a forfeiture of benefits by an employee except in clear instances; rather, the term should be construed in a manner least favorably to working a forfeiture so as to minimize the penal character of the provision by excluding cases not clearly intended to be within the exception.

Tenge v. Washington Group Int'l, Inc., 333 S.W.3d 492, 496 (Mo. App. E.D. 2011).

The evidence presented in this case, even deferring to the Commission's credibility findings, establishes only that Ms. Fendler was aware that she had to verify payroll by inputting the employees' exact in and out times and that on various occasions she verified payroll by instead inputting the general number of hours worked. Missouri courts have consistently held that this type of evidence, standing alone, does not establish the type of willful misconduct that should work a forfeiture of unemployment benefits, and there was no additional evidence that Ms. Fendler's omissions resulted in financial loss to the Employer or otherwise subjected the Employer to actual liability. Accordingly, this Court should find that Ms. Fendler did not commit misconduct connected with work.

CONCLUSION

The facts found by the Commission that Ms. Fendler verified payroll by inputting the general number of hours worked by employees into the timekeeping reports, instead of inputting the exact in and out times as instructed by her supervisor, are not, without more, competent and substantial evidence of willful misconduct. Therefore, Ms. Fendler respectfully requests that this Court reverse the decision of the Labor and Industrial Relations Commission and remand this case with instructions to award her unemployment benefits.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 2,767 words, including this certification as performed by Microsoft Word software; and
2. That the attached brief includes all the information required by Supreme Court Rule 55.03; and
3. That the foregoing brief was served via electronic filing, on this 21st day of March, 2012, to:

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4. That one (1) true and correct copy of the foregoing brief was sent via U.S. Postal Service, first class, postage prepaid, on this 21st day of March, 2012, to:

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